

Tan Kah Hoe & Anor v Budaya Adil Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D5-28-40 OF 1998

STEVE SHIM J

3 SEPTEMBER 1999

Companies and Corporations — Winding up — Disposition of property — Frozen current account — Application for leave of court to pay out money from frozen current account — Money necessary for legal fees — Whether application ought to be granted — Companies Act 1965 s 223

The petitioners petitioned for the respondent to be wound up and the respondent's bank froze its current account as a result of having notice of the winding-up proceedings. The respondent not only disputed the winding-up petition but also commenced an action against the first petitioner and another person for, inter alia, misappropriation of assets. The respondent engaged solicitors to handle both actions. The respondent thereafter applied in the winding-up proceedings for a sum of RM60,000 to be paid out from its current account to its firm of solicitors. The respondent contended that the application was for the sole purpose of paying its present and future legal fees and was necessary to obtain professional assistance. The respondent further averred that its creditors would benefit as part of the funds would pay for litigation against previous directors for an account of the moneys allegedly misappropriated by them.

Held, dismissing the application:

- (1) The solicitors had full knowledge of the winding-up petition before accepting the brief in respect of the cases mentioned. If leave was granted it would have the effect of paying the respondent's firm of solicitors, a creditor, in full, thereby securing the firm an advantage over the rest of the creditors. This was against the *pari passu* rule (see p 544D–E).
- (2) Any benefit accruing to the creditors pre-supposed the success of the litigation. In the absence of a *prima facie* case, it was an unreliable speculation (see p 544F–G).

[Bahasa Malaysia summary]

Pempetisyen telah mempetisyen supaya penentang digulung dan bank penentang membeku akaun semasanya setelah menerima notis tentang prosiding penggulungan. Penentang bukan sahaja mempertikaikan petisyen penggulungan tetapi juga memulakan satu tindakan terhadap pempetisyen pertama dan seorang lagi untuk, antara lain, pelepasan aset. Penentang telah menggaji peguamcara untuk mengendalikan kedua-dua tindakan. Selepas itu, penentang memohon dalam prosiding penggulungan agar jumlah sebanyak

- A** RM60,000 dibayar daripada akaun semasanya kepada firma peguamcara. Penentang berhujah bahawa permohonan itu adalah untuk tujuan tunggal membayar yuran undang-undang sekarang dan masa depan dan adalah perlu untuk memperolehi bantuan profesional. Penentang selanjutnya menegaskan bahawa pemiutangnya akan bermanfaat kerana sebahagian daripada wang itu akan digunakan untuk bayaran bagi litigasi terhadap pengarah-pengarah dahulu untuk suatu akaun wang yang dikatakan dilesapkan oleh mereka.
- B**

Diputuskan, menolak permohonan:

- C** (1) Peguamcara mempunyai pengetahuan sepenuhnya mengenai petisyen penggulungan sebelum menerima arahan berkenaan kes-kes yang disebut. Sekiranya kebenaran diberikan ia akan memberi kesan membayar firma peguamcara penentang, satu pihak pemiutang, dengan sepenuhnya, justeru itu menjaminkan kelebihan untuk firma tersebut melebihi pemiutang lain. Ini adalah bertentangan dengan rukun pari passu (lihat ms 544D–E).
- D** (2) Apa-apa manfaat yang terakru kepada pemiutang mengandaikan kejayaan litigasi. Dalam ketiadaan kes prima facie, ia merupakan spekulasi yang tidak boleh dipercayai (lihat ms 544F–G).]

E Notes

For cases on disposition of property in winding up proceedings, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 790–799.

Cases referred to

- F** *AI Levy (Holdings) Ltd, Re* [1963] 2 All ER 556 (refd)
Bianco Hiring Services Pty Ltd v Adelaide Truss & Frame Pty Ltd (In liquidation) [1992–1993] South Australia (refd)
BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd [1996] 1 MLJ 872 (refd)
- G** *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309 (refd)
Prospect Electricity v Advanced Glass Technologies of Australia Pty Ltd [1996] 14 CLA CLR 1721 (refd)
Tellsa Furniture Pty Ltd (In liquidation) v Glendare Nominees Pty Ltd [1987] 5 ACLC 662 (refd)
- H** *Wiltshire Iron Company, Re; ex p Pearson* (1867–1868) 3 ChD 443 (refd)

Legislation referred to

- I** Companies Act 1862 [Eng] s 153
Companies Act 1948 [Eng] s 227
Companies Act 1965 s 223
Companies Code [South Aust] s 368

CC Chan (Skrine & Co) for the petitioners.

SY Ng (Raja Eileen Soraya with her) (Raja Darryl & Loh) for the respondent.

Steve Shim J: This is the respondent's application by way of notice of motion at encl 42 made pursuant to s 223 of the Companies Act 1965. Prayer (1) states:

(1) that leave be granted for the sum of RM60,000 to be paid out of the respondent's current account no 004012-618950 held at Maybank, No 171-175, Jalan Munshi Abdullah, 75100 Melaka, to the respondent's solicitors, Messrs Raja Darryl & Loh, to be held in the respondent's client's account and to be utilized by Messrs Raja Darryl & Loh towards offsetting any sums or any part thereof due to Messrs Raja Darryl & Loh under any invoice which will be rendered to the respondent from time to time in respect of any matter arising out of the proceedings herein and the proceedings brought by the respondent against its previous directors.

The application is supported by the affidavit of Ong Chen Peng, a shareholder and managing director of the respondent affirmed on 19 March 1999. The petitioners have opposed the application, filing a notice of intention to use two affidavits-in-reply affirmed by them on 29 May 1998 and 6 November 1998, respectively.

The factual background to the application can be briefly stated herein. By a letter dated 23 March 1998, the respondent received a letter from Maybank, Jalan Munshi Abdullah, Melaka branch ('the bank') informing that the bank had frozen the respondent's current account, apparently as a result of having notice of the winding-up proceedings before the court. The respondent is presently involved in two litigations, one relating to disputing the winding-up petition lodged by the petitioners and the other concerns the respondent's action against the first petitioner and one Wong Kim Yong for, amongst other things, misappropriation of assets. The respondent has engaged M/s Raja Darryl & Loh to handle both these litigations. Hence, the notice of motion at encl 42.

It is the respondent's case that a sum of RM60,000, which it is presently seeking leave of the court to utilize, is for the sole purpose of paying its legal fees that have arisen and will be incurred due to those proceedings and that the orders sought are necessary to enable the respondent to obtain professional assistance to resist the winding-up petition filed by the petitioners and at the same time, to commence legal action against the first petitioner and another.

Now, s 223 of the Companies Act 1965 stipulates:

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the Court shall unless the Court otherwise orders be void.

In *Re Wiltshire Iron Company; ex p Pearson* (1867-1868) 3 ChD 443, Lord Cairns LJ in explaining the scope of s 153 of the English Companies Act 1862 (which is in pari materia to our s 223) had this to say at pp 446-447:

- A** The 153 section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for the winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company *in extremis*. But where a company actually trading, which it is in the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, *ipso facto*, paralyse the trade of the company and great injury, without any counter balance of advantage, would be done to those interested in the assets of the company.

Section 153 had subsequently been replaced by s 227 of the English Companies Act 1948 by the time Buckley J came to consider it in *Re AI Levy (Holdings) Ltd* [1963] 2 All ER 556. His Lordship described s 227 (which is in *pari materia* to our s 223) in this way (at pp 557–58):

- D**
- E** Section 227 of the Companies Act 1948 has in one form or another formed part of the companies winding-up legislation since it appeared as s 153 of the Companies Act 1862. I have been referred to various authorities in which the jurisdiction has been either exercised or commented on, the earliest of which is *Re International Life Assurance Society, Gibbs & West's case*, where. Sir R Malins VC cited a passage from Lord Cairns' judgment in *Re Wiltshire Iron Co, ex p Pearson*, which I need not read. That passage indicated a broad view of the nature of the jurisdiction conferred by the section and indicated that it was designed to preserve the value of the assets of a company for the benefit of the people interested in the assets notwithstanding the pendency of the winding-up proceedings, in order that the company might not be unduly hampered in carrying out transactions which might be for the benefit of those interested in the value of its assets.

It is interesting to note that *Re Wiltshire* had been cited with approval by the Supreme Court of South Australia in *Bianco Hiring Services Pty Ltd v Adelaide Truss & Frame Pty Ltd (In liquidation)* [1992–1993] South Australia. Thereat Leque J took the opportunity to further explain the equivalent s 368 of the Companies (SA) Code when he said *inter alia*:

- H** ... the Federal Court pointed out that what lies behind s 368 is the prevention of the improper alienation and dissipation of the company's property; it is not intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when he was entitled to have them.
- I** On the one hand, while the purpose of s 368 is undoubtedly to minimize hardship to the body of creditors generally, and which hardship to the particular creditor must be taken into account, it can hardly ever be conclusive. It has been held, consistently with the views expressed by Lord Cairns LJ in *Re Wiltshire Iron Co, ex p Pearson*, supra, that the discretion conferred upon the court by this section to validate transactions is controlled only by general principles applicable to judicial discretion ... Whether the court validates a disposition of the company's property made after the

commencement of a winding up is a matter for the discretion of the judge; and it has to be determined on the facts of each case by what is just and equitable in all the circumstances, special regard being had to whether the disposition was made bona fide.

Quite clearly, s 223 confers a discretion upon the court in determining, whether or not, having regard to the particular facts and circumstances of a given case, it should validate a disposition of property of a company. The power of the court to do so is controlled by general principles applicable to judicial discretion. The onus is on the applicant to satisfy the court of circumstances which would justify the exercise of the discretion to sanction the disposition.

In the instant case, the sole reason for seeking leave is to allow the respondent to fund the legal costs or fees in first resisting the winding-up petition launched by the petitioners and secondly to prosecute an action against its previous directors for, inter alia, misappropriation of assets. As such, it is contended that the application is purely for the benefit and assistance of the respondent as well as the creditors thereof. The petitioners have of course disputed this. A number of factors require consideration.

First, the facts disclosed in the affidavits seem to indicate that the respondent's solicitors, to whom the RM60,000 was to be disbursed, had full knowledge of the winding-up petition before accepting the contract in respect of the two litigations mentioned above. There is also indication that the disposition had not crystallized at the time of the application. In the circumstances, there is quite evidently serious doubt as to the bona fides of the said disposition: (see *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd* [1996] 1 MLJ 872; *Tellsa Furniture Pty Ltd (In liquidation) v Glendare Nominees Pty Ltd* (1987) 5 ACLC 662).

Secondly, again the affidavits would indicate that if leave to validate were granted, it would have the effect of paying the respondent's solicitors, a creditor, in full, thereby securing an advantage over the rest of the creditors. From the facts, it is, I think, sufficiently clear that the disposition was entered for the express purpose of securing an advantage to one creditor over the rest of the creditors. This would be against what was described as the *pari passu* rule in *Prospect Electricity v Advanced Glass Technologies of Australia Pty Ltd* [1996] 14 CLA CLR 1721. Such a rule was apparently adopted and applied in *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309 wherein Zakaria Yatim J (as he then was) held the view that the court could not exercise its discretion to make a validating order if the result of the order was to make one or more creditors being paid in full.

Thirdly, as I have stated, it is the respondent's stand that the creditors would also benefit if the application is granted because part of the funds would be required to pay for the litigation involving its action against the previous directors for an account of the monies allegedly misappropriated by them. Such a proposition merely presupposes the success of that action. In the absence of evidence establishing a *prima facie* case, this is nothing but an unreliable speculation or supposition. If the action lodged by the

A respondent were to fail, the respondent and therefore the creditors would conceivably be saddled with increased legal costs. From the facts as disclosed in the affidavits, I am not satisfied that the other creditors of the respondent would benefit from the application.

B From the reasons stated, I do not think it fair and proper to grant the motion in terms thereof. Accordingly, I will dismiss it with cost to be taxed unless otherwise agreed.

Application dismissed.

Reported by Andrew Christopher Simon

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